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Open for Business Act, 2010, **Bill 68**

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I: Introduction

The Canadian Environmental Law Association (CELA) is a legal aid clinic, specializing in environmental law and represents individuals and citizens groups before trial and appellate courts on a broad range of environmental issues. CELA was founded in 1970 for the purpose of using and improving laws to protect the environment and natural resources and has a lengthy history of involvement with issues related to the Ontario Ministry of Environment's (MoE) approvals system. CELA provided comments on the MoE's proposal for *Standardized Approvals Regulations* and *Approvals Exemption Regulations*. CELA counsel have represented clients in cases involving issues regarding the approvals process. A CELA counsel is also a member of the stakeholder roundtable to modernize the approvals process.

Ecojustice is Canada's premier non-profit organization providing free legal and scientific services to protect and restore the environment and human health. From offices at four locations across Canada, Ecojustice legal counsel work on the leading environmental issues across the country, at every level of court. Since forming in 1990, legal reforms and litigation around approvals of pollution sources for greater protection of local communities and their environment has formed a core of our work. Ecojustice's senior scientist is also a member of the stakeholder roundtable to modernize the approvals process.

Both CELA and Ecojustice counsel were involved in the *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* case, in which the Ontario Divisional Court upheld a decision of the Environmental Review Tribunal ("ERT") to grant a number of citizens leave to appeal certificates issued to Lafarge. One of the reasons for the Tribunal's decision was that, consistent with the Ministry of the Environment's Statement of Environmental Values, the Director should have assessed the potential cumulative ecological consequences of approving the applications before deciding whether to issue the impugned approvals.

The Canadian Institute for Environmental Law and Policy (CIELAP) was founded in 1970, with the mission to provide leadership in the research and development of environmental law and policy that promotes the public interest and sustainability. CIELAP has a long history of involvement in the environmental approvals process in Ontario, and was deeply engaged in past consultations such as the proposed standardized approvals regime in 1998. CIELAP's Research Director also serves as the author of the Butterworths LexisNexis publication,

Environmental Regulation in Canada, which is updated regularly to document the approvals regime in Ontario as well as other jurisdictions.

CELA, Ecojustice and CIELAP have provided detailed comments on the Ministry of the Environment's ("MoE") discussion paper titled "Modernization of Approvals: Proposed Legislative Framework for Modernizing Environmental Approvals" (Discussion Paper) which was posted on the Environmental Bill of Rights Registry (EBR Registry) on March 2, 2010 for a 45 day comment period.

On May 17, 2010, Bill 68, the proposed *Open for Business Act, 2010* was introduced and received first reading. The bill was also posted on the Environmental Bill of Rights Registry on June 24, 2010, EBR Registry Number 011-0317, for a 60 day comment period. Unfortunately, Bill 68 fails to address the concerns that we previously raised in relation to this government's proposal regarding environmental approvals. Consequently, the comments we provided in the joint brief remain applicable in relation to Bill 68 and we have attached a copy of our comments on the MoE's Discussion Paper.

On August 3, 2010, counsel from CELA and Ecojustice attended before the Standing Committee on Finance and Economic Affairs and made presentations on Bill 68. Our comments in this submission reiterate the concerns and recommendations we made to the Standing Committee.

II: APPROVALS MODERNIZATION IN ONTARIO

To begin, we would like to make it clear that our organizations appreciate the need to modernize the approvals process to ensure the operation of a more effective environmental approvals process in this province. However, we believe it is important for any changes to the approvals system be made in a manner that is protective of the environment and health of Ontarians, and recognizes the importance of public rights to participate in environmental decision-making processes.

A fundamental weakness of the current approvals system in Ontario is its failure to address the issue of cumulative effects, including background concentrations and emissions from other neighbouring sources, when decision-makers issue Certificates of Approval or other

instruments for individual facilities. This is a serious flaw, given that facilities are often located in close proximity to one another, and that the cumulative impact of several such facilities – including low-risk facilities – can be significant. Indeed, many areas of the province – including Sarnia, Hamilton, Windsor, and Sudbury – already face a disproportionately high air pollution burden.

In order to ensure adequate protection of the environment and human health, consideration of cumulative effects must be a part of the proposed two-tiered environmental approval system. Prior to making significant changes to the existing approvals system, we recommend that the MoE incorporate cumulative effects assessment into the regulatory framework governing the authorization of activities which result in the emission of air pollution.

Recommendation #1: The MoE should incorporate cumulative effects assessment into the regulatory framework governing the authorization of activities which result in the emission of air pollution prior to making other significant changes to the approvals system in Ontario.

III: SPECIFIC COMMENTS ON SCHEDULE 7, BILL 68

(a) Two-tiered Environmental Approval System

Under Bill 68 the government will be establishing a two-tiered approval system that will involve two separate and distinct processes for environmental approvals:

Registry Process: Under this process, certain activities would be registered with the MoE provided they meet specified eligibility requirements. A facility which was subject to this process would be required to operate in accordance with the rules established by regulation. This system has also been described as “permit-by-rule.” Individual registrations would not be required to be posted on the EBR registry and would not be subject to appeals by third party. There would also there would be no right to request a review of registrations

Certificate of Approval process: Under this process, applications for Certificates of Approval would need to be made to the MoE and would cover activities not eligible for the registration process. A number of changes are proposed for the Certificate of

Approval process which is discussed in the joint brief by environmental non-governmental organizations.

(b) Exemption of the *Environmental Bill of Rights, 1993* from the Registration Process

The enactment of the *Environmental Bill of Rights, 1993 (EBR)* approximately sixteen years ago greatly enhanced public participation in the environmental decision-making process in this province. This included the requirement for public notice and minimum 30-day comment period for all proposals for new regulations policies and instruments and an opportunity to seek leave to appeal instruments issued by the MoE, such as Certificates of Approval. Bill 68, as drafted, would result in a loss of these fundamental rights.

(i) Negative Impacts on Public Participation in the Environmental Decision-Making Process

The public would no longer have an opportunity to provide comments to the MoE on whether a particular activity should be subject to the registration process. This will be problematic given that even if an activity meets the requirements set out in regulation, there may be unique local environmental conditions, such as proximity to endangered species' habitat and natural features and systems. In addition, while an individual activity may not, by itself, pose a risk to the environment, numerous activities operating in relatively close proximity to each other may produce cumulative effects which cause adverse impacts.

(ii) Loss of Public's Rights to Appeal

The *EBR* also provides the right for third parties to appeal instruments to the ERT, provided they can meet the stringent leave to appeal criteria set out in s. 41 of the *EBR*. In a number of cases, where leave has been granted, the approval in question was ultimately either amended or revoked. Notable recent examples include: *Dawber v. Ontario (Director, Ministry of Environment)*; *Baker v. Ontario (Director, Ministry of Environment)*; *Trent Talbot River Property Owners Association v. Ontario (Director, Ministry of Environment)*; and *Lukasik v. Ontario (Director, Ministry of Environment)*.

Public participation and the leave to appeal provisions have, thus, been instrumental in making changes to Certificates of Approval and other instruments to ensure protection of the environment and human health. The leave to appeal process allows the public to take steps to have the Director's decision to issue the Certificate of Approval reviewed independently by the

ERT prior to the operation of the facility. The leave to appeal provision, thus, constitutes a core component of the *EBR* regime. Bill 68 would revoke this important legal right in relation to activities subject to the registration process and raises serious concerns about the government's commitment to public participation in the environmental decision-making process.

An evaluation of the *EBR* done almost a decade after its enactment concluded that it has not had a measurable impact on delaying approvals. Consequently, there is no compelling rationale which would justify the exemption of the *EBR* from the registration process.

If this bill is passed in its current version, it would result in the roll back of public participation rights – rights which Ontario citizens have had since the enactment of the *EBR* in 1994.

Accordingly, we recommend that Schedule 7 of Bill 68 be amended to ensure that an activity subject to the Registry be deemed to be an instrument under the *EBR*. In addition, Parts II, IV, V and VI of the *EBR* should apply to activities subject to registration.

Recommendation #2: A proposal to register an activity on the Registry should be deemed to be an instrument under the *Environmental Bill of Rights, 1993*.

Recommendation #3: Parts II, IV, V and VI of the *Environmental Bill of Rights, 1993* should apply to activities subject to registration on the Registry.

(c) Defence of Statutory Authority Should Not Apply to the Registration System

Statutory authorization can be used as a defence to a range of civil legal actions, such as private nuisance, public nuisance, riparian rights, and "Rylands and Fletcher" or "strict liability" claims. It bars redress where the legislature has expressly or implicitly authorized a work which can only be done by causing a nuisance or other violation of private rights, and no compensation is provided in the statute. That is, where a statute or regulation explicitly or implicitly authorizes a work to be carried out which can only be done by causing such a violation, the legislature has, in effect, authorized the infringement.

The issuance of a Certificate of Approval under the *Environmental Protection Act* (EPA) or the *Ontario Water Resources Act*, (*OWRA*) does not provide a defence to the approval holder from an action arising from the approved activity. At present, it is unclear whether activities subject to the registration process will be deemed to have statutory authority to carry out the activity by virtue of the fact that the requirements for such activities will be prescribed by regulation.

The application of the defence of statutory authority to activities subject to the registration system would have a significant negative effect on citizens' access to justice as this, in conjunction with the Crown immunity clause in s. 177.1 of the *EPA*, would effectively leave members of the public who suffer damages as a result of an activity subject to the registration system with no rights to civil recourse. It is important that there be express statutory language clarifying that activities which operate subject to the registration process are not deemed to have statutory authority to undertake the activity pursuant to regulation.

Recommendation #4: Schedule 7 in Bill 68 should expressly state that activities which operate subject to the registration process are not deemed to have statutory authority to undertake the activity.

IV: CONCLUSION

CELA, Ecojustice and CIELAP have serious concerns with regard to the potential for Bill 68, as drafted, to undermine environmental protection and significantly erode the public's right to participate in environmental decision-making processes. We urge the government to ensure that activities subject to the proposed registration process under schedule 7 of Bill 68 be subject to the legal rights currently provided to Ontarians under the *Environmental Bill of Rights, 1993*. Furthermore, we urge the government to ensure that citizens who suffer damages as a result of activities subject to the registration system retain their right to seek civil recourse through the courts.